



The interpretative answer to the hijab row

The courts will be called upon to protect an essential religious practice



A focal point

1. In the Shirur Mutt case of 1954, the Court ruled, “...what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself.”
2. Ever thereafter, the judgment in Shirur Mutt has remained the focal point of constitutional discussion on religious freedoms.
3. The “essential religious practices” test appeased traditionalists by ‘assuring them that the Court would be sympathetic to their respective religious faiths.
4. It also supported state-sponsored reform by leaving one agency of the state — the judiciary — with the power to determine and pronounce upon (perhaps, transform) religious practice and belief’.

‘Religious practice’

1. Since it was first propounded, the “essential religious practice” test has been problematic. How is the Court to determine what an ‘essential practice’ is?

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Should it 'rely on religious leaders'? Should it 'call for evidence? Should judges 'pursue these questions on the basis of their own research?

2. Justice D.Y. Chandrachud in the Sabarimala case, bemoaned, "... compulsions nonetheless have led the court to don a theological mantle. The enquiry has moved from deciding what is essentially religious to what is an essential religious practice.
3. Donning such a role is not an easy task when the Court is called upon to decide whether a practice does nor does not form an essential part of a religious belief.
4. Scriptures and customs merge with bewildering complexity into superstition and dogma. Separating the grain from the chaff involves a complex adjudicatory function.
5. Decisions of the Court have attempted to bring in a measure of objectivity by holding that the Court has been called upon to decide on the basis of the tenets of the religion itself. But even that is not a consistent norm."

In the case of the hijab, there is no doubt that an observant Muslim woman might insist that the following verses from the Koran mandate her to keep her head covered. Chapter 33, Verse 59 says "O Prophet! Enjoin your wives, your daughters, and the wives of true believers that they should cast their outer garments over their persons (when abroad): That is most convenient, that they may be distinguished and not be harassed."